04-15919

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLE BRADLEY,

Petitioner-Appellant,

v.

GLORIA HENRY, Warden,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. C 03-03034 PJH
The Honorable Phyllis J. Hamilton, Judge

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

Respondent-appellee hereby petitions for rehearing or rehearing en banc of this Court's 2-1 published opinion in *Bradley v. Henry*, No. 04-15919, filed June 22, 2005. Rehearing is warranted because the panel majority misapprehended the applicable law, FRAP 40(a)(2), and rehearing en banc is warranted because the opinion conflicts with the law of the United States Supreme Court. FRAP 35(b)(1)(A).

The majority found a due process violation based on Bradley's absence from an in camera hearing at which the state court relieved her retained attorneys

(who were not being paid) and appointed counsel. The majority found the error prejudicial because Bradley was entitled to "a lawyer whom she could trust, who would be her friend, her champion, her sagacious counselor," and because if she had been present "she could have said whether or not she wanted a lawyer selected for her by the court." Slip Opn. at 7463-7464.

However, the Supreme Court has made clear that there is no requirement that the attorney-client relationship reach a particular level of rapport, beyond that necessary to provide effective representation. In *Morris v. Slappy*, 461 U.S. 1, 13 (1983), the Supreme Court rejected this Court's imposition of a right to a "meaningful attorney-client relationship." Bradley does not dispute that she received effective assistance from her appointed counsel; nothing more was required.

Further, even if Bradley had personally informed the court that she did not want counsel to be appointed (which the court already knew because her retained attorney had conveyed the objection), the Supreme Court has held that the Sixth Amendment right to choose one's own counsel may be circumscribed. Specifically, "a defendant may not insist on representation by an attorney he cannot afford." *Wheat v. United States*, 486 U.S. 153, 159 (1988). Bradley's retained counsel told the court that Bradley's father, who had hired her, had

stopped paying her, and that she could not prepare the defense. Under these circumstances, Bradley's protestation that she did not want a lawyer selected by the court would have not altered the outcome of the hearing.

The majority's basis for finding prejudice cannot be reconciled with these clearly established Supreme Court authorities. Accordingly, rehearing or rehearing en banc should be granted to remedy this untenable result.

STATEMENT OF OPERATIVE FACTS

A. State Court Proceedings

On January 17, 1996, Bradley, who was 18 years old, and two other teenagers attempted a carjacking; in the process Bradley shot to death the car's driver. The evidence of Bradley's guilt was overwhelming: both accomplices testified against Bradley, along with the police officer to whom she confessed that she planned to take the vehicle and accidentally shot the driver. On April 27, 1999, a jury convicted Bradley of first-degree murder, attempted carjacking, and possession of a short-barreled shotgun. A robbery-murder special circumstance allegation was dismissed on Bradley's motion during trial.[1/]

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1. The majority appears to be under the erroneous impression that Bradley faced the death penalty in this case. Slip Opn. at 7454 ("capital case"); *id.* ("If convicted, she could be executed."); 7463 ("capital case"); ("On trial for her life"); 7465 ("capital case"). Bradley was charged with a special circumstance

Bradley's trial did not begin for more than three years after her arrest because of repeated substitutions of counsel. She went through three sets of attorneys retained by her father before the trial court appointed counsel to represent her. To briefly summarize, Bradley was represented in January and February 1996 by retained attorneys Hutchinson and Montgomery. Montgomery was disqualified due to a conflict of interest; Bradley retained Miller to assist Hutchinson. In October 1996, Miller and Hutchinson were replaced by retained attorneys Sacks and Thistlewaite. In January 1998, Sacks and Thistlewaite were replaced by retained attorneys Steigerwalt and Dunlevy. At that point the court stated, "I want to make it very clear to the defendant and her father this will be the last change in counsel. We've had quite a few competent lawyers coming through the defense of the matter. This has to be the end of the changes in that regard."

On March 4, 1998, the court held the in camera hearing that is the subject of these proceedings. Bradley did not attend the hearing, at which Dunlevy and Steigerwalt sought to be relieved. One basis for the motion was that retained counsel were not being paid and therefore could not prepare the defense.[2/]

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allegation, which carried a penalty of life without possibility of parole, but the District Attorney never sought the death penalty.

2. According to their declarations, Dunlevy and Steigerwalt had only "been paid a fraction of what was agreed upon to prepare and try this case." ER 113, 117 (emphasis in original). Despite the lack of payment, counsel had continued

Dunlevy stated that she and Steigerwalt were the latest "victims" of Mr. Bradley's "pattern," which was to promise funds to counsel, fail to pay them, and then retain different counsel and obtain a continuance. ER 57. Dunlevy also stated that she had other conflicts, including that Mr. Bradley had threatened Dunlevy's safety if she attempted to settle the case, as Bradley herself had requested. ER 63-65. Mr. Bradley also had started investigating the prosecutor's personal life, which caused the District Attorney of Sonoma County such concern for her safety that he appeared at the hearing. ER 55-58. At least one expert had withdrawn because of the investigation of the prosecutor, ER 63, and counsel believed the trial court should issue a restraining order against Mr. Bradley. ER 70. Dunlevy expressly advised the court that Bradley and Mr. Bradley "would be objecting to my being relieved." ER 71.

Immediately after the in camera hearing, Dunlevy repeated her request to be relieved in open court with Bradley present. The court granted the request and appointed Andrian, noting that the case was then two years old and the history of the case demonstrated it might never get to trial with retained counsel because of the failure to pay them. The court declined to hear from Hutchinson, who was not

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working on the case and had even advanced their own funds, resulting in "serious financial hardship." ER 113, 117. The lack of funding had also caused them to lose the services of critical expert witnesses. ER 114, 118.

present at the in camera hearing and had been specially retained on the issue of the motion to relieve counsel.

On October 21, 1998, Bradley moved to substitute counsel pursuant to *People v. Marsden*, 2 Cal.3d 118, 465 P.2d 44, 84 Cal.Rptr. 156 (1970). Bradley read a prepared statement in which she complained that Andrian had lied to her in that he said he would see her regularly but had only had limited contact; he had spent all his time preparing an insanity defense, which she did not want because she was innocent; he refused to file a second discovery motion on a police officer; he failed to conduct interviews with unnamed people who could prove her innocence; and he failed to investigate the victim. ER 130-135. Andrian informed the court that Bradley had lodged a complaint against him with the California State Bar and intended to sue his law firm, which created a conflict because his insurance carrier required him to cease communicating with the client in such circumstances. ER 126-127. In response to Bradley's specific complaints, Andrian stated that he had not personally seen Bradley that much but his investigator had; he believed an insanity defense should be explored but had not focused all his time on it; he had already filed a discovery motion on the officer but it was denied; he had already investigated the witnesses Bradley had told him about; and he had been diligently preparing the defense but needed additional time

because he had to evaluate 12 boxes of materials and had only gotten funding for experts the month before. ER 135-155. The court found that the record "does not establish anything approaching inadequate representation," but left open the conflict issue. ER 155, 163. By December 1998, the county had approved an indemnity agreement that resolved the conflict.[3]

On January 19, 1999, 35 days before the trial date, Bradley moved to substitute retained counsel Jordan for Andrian. Jordan claimed he would not need a continuance. ER 183. Bradley stated she did not know whether she had the funds to pay for counsel. ER 186. When the court gave Jordan an opportunity to establish a record on the financial arrangements, Jordan stated only, "that is not a concern at this point." ER 187. The court denied the substitution request, finding that the history of the case involved "lawyer churning, to the effect of interminable delays;" that appointed counsel had been preparing for trial for a considerable time; and that in spite of counsel's assertions there was a significant danger of delay in substituting retained counsel at that point. ER 188.

The California Court of Appeal rejected Bradley's claim that she was denied the right to be present at the March 1998 in camera hearing, finding that the error, if any, was harmless beyond a reasonable doubt. Even if Bradley had

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3. Bradley did not pursue a civil malpractice lawsuit against Andrian. No action was taken on her state bar complaint. Andrian has no record of discipline.

been present, she could not have refuted Dunlevy's claim that she was not being paid, because Bradley herself was not paying Dunlevy and had no personal knowledge on the subject. Bradley contended Dunlevy sought to withdraw because she wanted Bradley to accept a plea bargain while Bradley wanted to go to trial, but that contention would not have negated the fact that Dunlevy "was not receiving adequate funds to conduct any defense, much less the more extensive defense that Bradley purportedly desired." Nor did Bradley have any personal knowledge whether her father was investigating the prosecutor. "Given the age of the case and the trial court's own observations of a parade of retained attorneys passing through its court as counsel for Bradley, we cannot imagine anything that Bradley could have said that would have changed the court's ruling." ER 40-41.

The state appellate court also rejected Bradley's claim that she was denied the right to counsel as a result of the March 1998 hearing. Citing *Wheat v. United States*, 486 U.S. at 159, the court found that Bradley had no right to insist on representation by counsel she could not afford. As to the court's refusal to let Hutchison speak, the state appellate court noted that Bradley had no Sixth Amendment right to retain counsel for individual issues if she disagreed with counsel of record, and that any error was harmless because nothing Hutchinson could have said would have altered the basis of the court's ruling. ER 42-44.

B. Panel Opinion

The panel majority found that Bradley's absence from the March 1998 hearing constituted a due process violation because it "deprived her of the opportunity to speak to the choice of counsel." Slip Opn. at 7463. The majority determined that the error was prejudicial because Bradley "needed a lawyer whom she could trust, with whom she could communicate freely, who would be her friend, her champion, her sagacious counselor." *Id.* The majority found that appointed counsel Andrian was an "incubus" that Bradley "sought to rid herself of." *Id.* The majority held that the state appellate court's conclusion was unreasonable, because regardless whether Bradley could have addressed the payment of counsel, she could have informed the court whether she wanted a lawyer selected for her by the court and whether she wanted Andrian in particular. *Id.* at 7464.

Judge Ferguson concurred, finding that Bradley also was denied her a Sixth Amendment right to select counsel of her choice. By excluding Bradley from the hearing and declining to let Hutchinson speak, the court "silenced her entirely, the effect of which was to divest of any value or weight Bradley's Sixth Amendment right to counsel of choice." Judge Ferguson found this error structural. *Id.* at 7465.

Judge Rymer dissented, finding that the state appellate court reasonably applied Supreme Court authority on both the presence error and choice of counsel issues. Judge Rymer found no due process violation, because Bradley had nothing to contribute to the discussion of whether Dunlevy was getting paid or whether Mr. Bradley was investigating the prosecutor. No matter what Bradley might have said, the court's ruling would have been the same because of the age of the case and "the parade of retained attorneys who had been stymied" by Mr. Bradley's interference. *Id.* at 7467-7468. As to the Sixth Amendment issue, Judge Rymer held that Bradley had no constitutional right to the lawyer she preferred. Given the history and age of the case, and the fact that Andrian had been preparing the case for some time, the state court's ruling was not unreasonable. *Id.* at 7468-7469.

ARGUMENT

The panel majority's prejudice analysis is fatally flawed in several ways.[4/] The majority found prejudice because by relieving Bradley's unpaid retained attorneys and appointing counsel, the court deprived her of "a lawyer she could trust, with whom she could communicate freely, who would be her friend, her champion, her sagacious counselor." Slip Opn. at 7463. However, there is simply no right to such an intimate relationship with an attorney. In *Morris v. Slappy*, 461 U.S. 1, the Supreme Court found that this Court's holding that a defendant has a right to a "meaningful attorney-client relationship" was "without basis in the law." *Id.* at 13. The Supreme Court noted that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney — privately retained or provided by the public," that this Court had contemplated. *Id.*; *United States v. Holloway*, 259 F.3d 1199, 1201 (9th Cir. 2001) ("A 'meaningful relationship' between client and counsel has been judged by high authority to be unnecessary to satisfy the Sixth Amendment.") (Noonan, J., citing

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4. The state appellate court did not specifically rule on whether Bradley's absence constituted a due process violation; it simply held that "the error, if any, . . . was harmless beyond a reasonable doubt." ER 40. We have argued that there was no constitutional error as defined in *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), and agree with Judge Rymer's analysis on this point. Slip Opn. at 7466-7468. However, because the error and prejudice analyses are similar, for purposes of rehearing we focus only on the respects in which the majority's prejudice analysis was wrong.

Morris v. Slappy). This Court's holding cannot be reconciled with *Morris*.

Further, the majority completely overstated the nature of Bradley's relationship with appointed counsel Andrian, whom it characterized as "an incubus she sought to rid herself of."[5/] Slip Opn. at 7463. This apparently refers to the *Marsden* motion, at which Bradley sought to substitute counsel and listed her complaints about Andrian. However, those complaints were typical of the common bases for dissatisfaction with counsel, and, as the state court found, did "not establish anything approaching inadequate representation." *See Morris v. Slappy*, 461 U.S. at 6-8 (defendant complained that counsel had only met with him once and had not conducted a sufficient investigation); *United States v. Schaff*, 948 F.2d 501, 504-505 (9th Cir. 1991) (defendant was upset that counsel had recommended that he accept plea bargain); *Hudson v. Rushen,* 686 F.2d 826, 832 (9th Cir. 1982) (defendant expressed "loss of confidence" in attorney). In addition, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657 n. 21 (1984). It bears repeating that Bradley did not challenge Andrian's representation in her later appeal, nor would such a claim have prevailed. Despite

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5. An "incubus" is: "1. An evil spirit believed to descend upon and have sexual intercourse with sleeping women. 2. A nightmare. 3. Something that is oppressively or nightmarishly burdensome." American Heritage Dictionary (2d ed. 1982).

Bradley's assertions at the *Marsden* hearing that she was innocent, the evidence of her guilt was overwhelming; nevertheless, Andrian succeeded in obtaining dismissal of the most serious allegation against her, the felony-murder special circumstance, as well as the attempted robbery charge. Regardless whether Andrian was Bradley's "friend," he clearly was a "sagacious counselor."

The majority also found prejudice based on Bradley's inability to inform the court "whether Andrian was a lawyer that she wanted to have," and "whether or not she wanted a lawyer selected for her by the court."[6/] Slip Opn. at 7464. However, in *Wheat v. United States*, 486 U.S. 153, the Supreme Court stated, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 159. The Supreme Court noted that "the right to choose one's own counsel is circumscribed in several important respects," including that "a defendant may not insist on representation by an attorney he cannot afford." *Id.*;

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6. The majority overlooks the fact that the court was well aware that Bradley wanted to keep her retained counsel and did not want appointed counsel, inasmuch as Dunlevy expressly stated that Bradley and her father "would be objecting to my being relieved," ER 71, and Hutchinson had been specially retained to address that issue.

accord, Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989) (Sixth Amendment "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts"); *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc) ("The qualified right of choice of counsel applies only to persons who can afford to retain counsel."). Because it was clear that Mr. Bradley had again reneged on his promise to pay the chosen lawyers, Bradley could not under any circumstances have insisted on continued representation by Dunlevy and Steigerwalt, attorneys she could not afford. The majority's holding cannot be reconciled with *Wheat*.[7]

Moreover, the state appellate court emphasized that it was "the very extraordinary nature of the facts of this case" that compelled its holding. ER 50. The court's conclusion — that "[g]iven the age of the case and the trial court's own observations of a parade of retained attorneys passing through its court as counsel for Bradley, we cannot imagine anything that Bradley could have said that would have changed the court's ruling," ER 40-41 — was clearly a reasonable application of *Morris, Wheat*, and the jurisprudence of harmless error. *See* 28

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7. To the extent the concurring judge found structural error based on the denial of counsel of choice, that conclusion also cannot be reconciled with *Wheat*.

U.S.C. § 2254(d); *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) ("habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner"); *Campbell v. Rice*, 408 F.3d 1166, 2005 U.S. App. LEXIS 9221, *14-15 (9th Cir. 2005) (en banc).[8/]

Finally, nowhere does the majority cite the applicable standard of prejudice on habeas corpus review, *Brecht v. Abrahamson,* 507 U.S. 619 (1993). The majority stated only that the prejudice to Bradley was "palpable." Slip Opn. at 7463.[9/] Accordingly, it appears that majority's quantification of prejudice was untethered to any measurable standard, much less the one required by the Supreme Court. *See Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (per curiam). The

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8. Denial of relief would be compelled by the Supreme Court's holdings in *Morris* and *Wheat* even if this case were not governed by 28 U.S.C. § 2254(d). Under that statute, which "demands that state court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), the appropriate result is doubly clear.

9. The majority also questioned whether the error should be reviewed for harmlessness at all, relying on dicta in *Flanagan v. United States*, 465 U.S. 259, 268 (1984), that an erroneous disqualification of retained counsel for conflict of interest does not require a showing of prejudice. Slip Opn. at 7463. Even if that dicta were relevant and controlling here, which we dispute, the constitutional error identified by the majority was Bradley's absence from the in camera hearing, not the denial of counsel of choice. Two en banc cases by this Court have made clear that presence error is not structural. *Campbell v. Rice*, 408 F.3d 1166 (9th Cir. 2005) (en banc); *Rice v. Wood*, 77 F.3d 1138 (9th Cir. 1996) (en banc); *accord, Rushen v. Spain*, 464 U.S. 114, 117 (1983) (per curiam); *see Arizona v. Fulminante*, 499 U.S. 279, 307 (1991) (listing presence error as type of trial error that may be considered harmless).

Brecht standard requires more than a "reasonably possibility" that the error affected the outcome; the writ may be granted only where the error resulted in "actual prejudice." *Morales v. Woodford*, 336 F.3d 1136, 1148 (9th Cir. 2003). For the reasons explained above, the majority's prejudice finding was grounded on factors that have been expressly disapproved by the Supreme Court. Once any error is properly analyzed, it is apparent that no "substantial and injurious effect" resulted. *See Brecht*, 507 U.S. at 637.

CONCLUSION

Accordingly, respondent respectfully requests that rehearing or rehearing en banc be granted.

Dated: July 6, 2005

Respectfully submitted,

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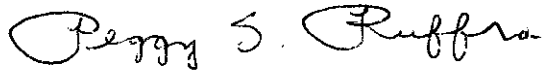

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REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

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CASES

In its petition for rehearing en banc, the State of California references the "very extraordinary nature of the facts of this case." (Petition for Rehearing [hereafter "PFR," at 14). Indeed the facts of this case concerning the deprivation of Bradley's right to counsel are remarkable, indeed perhaps unprecedented in American jurisprudence. Many of these striking facts are, however, absent from the state's petition, omissions which grossly distort the record supporting the panel's grant of habeas relief.

In March of 1998, the state trial court convened in chambers a meeting ostensibly to hear a motion by Cynthia Dunlevy, petitioner Bradley's retained counsel, to withdraw. Remarkably, despite the fact that it was petitioner Bradley's representation at her special-circumstances murder trial that was to be discussed, the trial judge excluded Bradley from the meeting, as well as Patrick Hutchinson, the counsel Bradley had specially retained to oppose the withdrawal motion. Even more remarkably, the court permitted the elected District Attorney and his deputy to participate in the hearing from which the petitioner and Hutchinson, her legal representative, had been excluded. Bradley v. Henry, 413 F.3d 961, 963 (9th Cir. 2005).

It immediately became apparent that the District Attorney's concern at the meeting was much broader than the withdrawal motion; rather, he sought to

extinguish Bradley's Sixth Amendment right to be represented by retained counsel and to ensure that the counsel to be appointed to represent her would be one *that the prosecutor approved of.* (ER 57) That attorney, Chris Andrian, who had no legal status whatsoever in the matter at the time, also was permitted to be present at the in camera hearing and to argue for the deprivation of Bradley's right to retained counsel and his own appointment. (ER 61, 70-72) The same was true of Dunlevy, Bradley's retained counsel, who, since she was seeking to withdraw against her client's wishes, certainly had no valid interest that entitled her to voice her opinion as to Bradley's future representation. In sum, a host of voices were raised at the in camera conference urging the deprivation of Bradley's constitutional right to retained counsel, but no one, including Bradley herself, was permitted to attend to speak in that right's defense.

There is simply no element of the constitutional right to procedural due process more fundamental than the guarantee of an opportunity to respond to allegations tendered as the justification for a deprivation of a party's rights. That bedrock principle flows from the eternal verity that it is impossible for a fact finder to get to the truth unless he or she hears both sides of the story. Rather than holding a fair hearing, the trial judge accepted untested statements the truth of which the state court, at a minimum, could not possibly determine. Scandalously,

some of those statements from withdrawing counsel purported to be descriptions of attorney-client communications which, even had those descriptions been accurate, could not ethically be disclosed to the court, much less to the prosecutor. No one was present at the secret session, however, to assert Bradley's attorney-client privilege.

Of paramount importance, many of the alarmist assertions tendered by both withdrawing counsel and the District Attorney, including the claim that defense counsel had not been well paid, were utterly false and, as demonstrated below, could have been proven so by Bradley and the attorney she had retained to represent her at the proceeding. But the District Attorney successfully argued that the matters discussed at the hearing should be kept secret from Bradley; and that her legal representative waiting outside chambers "*shouldn't be allowed to open his mouth.*" (ER 77), a position supported by the attorney whose appointment as Bradley's counsel the prosecutor heartily endorsed. (Id.)

As a result of the closed meeting, the contents of which were not disclosed to petitioner's counsel until the state appeal, Bradley's right to retained counsel was withdrawn by the trial court for good. Unsurprisingly, Bradley was unable to develop a relationship of trust with attorney Andrian, who had assisted in the deprivation of her right to counsel and who had been appointed "with the approval

of her adversary." 413 F.3d at 969. Andrian later declared a conflict of interest and stated that he could not work with Bradley or prepare for trial. (ER 165) He stated:

> the relationship between myself and Ms. Bradley has completely broken down, including that fact that we believe, as we sit here today, there are legal and professional conflicts of interest that exist between myself, my law firm and Ms. Bradley.

(ER 169)

Nonetheless, when John Jordan, retained by Bradley, appeared five weeks before trial and assured the state trial court he was prepared to try the case on the scheduled date and had completed all necessary financial arrangements, the court denied Bradley's substitution request, resting its decision in part on the false information provided at the in camera hearing. (413 F.3d at 968: "At the in-camera hearing, the trial judge effectively sealed Bradley's ability to maintain and secure counsel of her choice in a capital case.") (Ferguson, J., concurring).

In its petition for rehearing, the state does not dispute the proposition that the exclusion from the in-camera hearing of Bradley and Hutchinson, the attorney prepared in defense of her right to retained counsel, was legal error. Rather, like the state appellate court (and the dissenting opinion in this Court), respondent-appellee maintains that the erroneous exclusion was necessarily harmless because there was nothing of value Bradley or her legal representative could have offered

in defense of her Sixth Amendment right. That assertion, however, necessarily rests on the assumption that all of what was said at the closed hearing by Bradley's adversaries was in every respect true beyond challenge. Deeming an allegation true without permitting the object of that allegation an opportunity to refute it is precisely the dangerous practice the constitutional guarantee of due process was designed to proscribe. Having learned for the first time on direct appeal what was discussed at the in-camera hearing, Bradley tendered to the California Court of Appeal, to the state Supreme Court, and to the district court below the extensive relevant information she would have presented to the state trial court had she and attorney Hutchinson been permitted to attend the in camera hearing. That information is summarized below.

The state also appears to maintain that even if the due process violation wrongly resulted in the deprivation of Bradley's right to retained counsel, the error cannot be deemed prejudicial as long as she was represented by competent appointed counsel at trial. That reasoning, of course, would render the Sixth Amendment right to retained counsel meaningless; a trial court could capriciously refuse to allow a defendant to retain counsel knowing that the constitutional violation would go without remedy as long as the defendant was represented by a public defender or state-appointed counsel. The law, as appears, is precisely to the

contrary: a violation of the constitutional right to retained counsel is inherently prejudicial. In any case, as the majority held, the conflict between attorney Andrian and Bradley that Andrian himself declared and the complete breakdown in their relationship rendered the prejudice from the denial of petitioner's right to retained counsel "palpable." 413 F.3d at 968.

There is no reported decision in which a defendant was so patently deprived of both her constitutionally guaranteed opportunity to defend her Sixth Amendment right to retained counsel, as well as of the substance of that constitutional right, as was petitioner at her state court trial. The majority's decision will help to ensure that the wrong which occurred here is not repeated. Rehearing and rehearing en banc in this very fact-specific case should be denied.

I. THE EXCLUSION OF BRADLEY AND ATTORNEY HUTCHINSON FROM THE IN CAMERA HEARING WAS DEMONSTRABLY PREJUDICIAL AS IT DEPRIVED PETITIONER OF THE OPPORTUNITY TO PRESENT INFORMATION CRITICALLY RELEVANT TO ISSUES BEFORE THE TRIAL COURT

A. The Relevant Information

The subject of the March 4th hearing was attorney Dunlevy's (and Steigerwalt's) withdrawal motion. The motion was based on an alleged conflict arising from two primary sources: (a) allegations of surveillance of public officials by petitioner's father, with the possible object of violence, and (b) the claim by

Dunlevy that the senior Bradley had failed to pay legal bills, thus causing the lawyers a financial hardship and undermining the defense by causing experts to abandon the case. (ER 24-25) As to both of these issues, Bradley's presence at the hearing was critical.

The California Court of Appeal stated that had Bradley attended the hearing, she could not have addressed the first of the critical subjects at the hearing, i.e, of alleged surveillance and harassment, "because it was never alleged that she had caused these things to occur." (ER 40) On several levels, that assertion is unsound. The trial court heard Ms. Dunlevy out on the subject, although *she* had admitted that her information was hearsay-- i.e., "from conversation"-- and Dunlevy was not alleged to have "caused these things to occur." The District Attorney, who should never have been at a hearing on the subject of Bradley's counsel in the first place, was permitted to shoehorn into the record the complete fantasy "that someone was planning a violent act to get a continuance." (ER 24) That the allegations were unfounded is made evident by the fact that, while the District Attorney promised to "get a grip on an investigation on who has been stalking a deputy District Attorney and why" (ER 79), no investigation ever unearthed any evidence of wrongdoing on the part of the defense.

So, what could Bradley have done had she and a lawyer who was not

abandoning her been at the hearing? A great deal. Had she been permitted to attend the hearing on March 4th, defendant Bradley could have provided reliable information from Howard Eisemann (who entered the matter as an investigator in late 1996 with the firm Professional Investigations, Inc. of San Diego) and others, or even called them to testify, effectively rebutting Dunlevy and the District Attorney's explosive and completely manufactured allegation of violent harassment of state officials.

As Ms. Bradley informed the Court of Appeal and the California Supreme Court in her Petition for Review, the truth regarding the "confidential" file is this: at the commencement of this case in 1996, Joe Bradley, the defendant's father, had an investigative firm do background and records checks on the principals involved in the case, including police and prosecutor Knotts. The records obtained were of the sort generally available in public data bases. To the extent the case involved an allegation that a detective named Duenas coerced a confession from the defendant, a background investigation was appropriate. More importantly, Eisemann has confirmed that the file in question was in existence in late 1996, and that it never related to any personal surveillance of the prosecutor or anyone else associated with the prosecution of the case.

All files, including the background files, were transferred to Kerry

Steigerwalt and Cynthia Dunlevy soon after they were formally substituted in on January 21, 1998. Eisemann discussed the file with Dunlevy soon thereafter. The clear thrust of Dunlevy's remarks to the trial court was that the file in question was something she had recently discovered, and that it was related to a then-ongoing effort to harass the prosecutor. These assertions were simply untrue. Bradley could have refuted them if she had been permitted to attend the March 4th hearing.

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Furthermore, as noted, the due process violation extended beyond the hearing. Patrick Hutchinson sought to speak for Bradley at the hearing in open court that followed the closed session. Bradley expressed, through Dunlevy, her desire to have Hutchinson speak on her behalf. The trial court refused to permit the lawyer even to make a record on the critical issues at stake.

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The majority here correctly concluded that: "A fair and just hearing was thwarted by Bradley's absence from the conference in Judge Tansil's chambers." 413 F.3d at 968.

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Ordinarily, "[i]n both 'contrary to' and 'unreasonable application' cases, the erroneous state court ruling must also satisfy Brecht v. Abrahamson,507 U.S. 619, 637 [] (requiring that the error have had a substantial or injurious effect on the verdict)." Benn v. Lambert, 283 F.3d 1040, 1052 n.6 (9th Cir. 2002). It is well settled, however, that structural errors in the trial mechanism, as opposed to trial errors occurring in the presentation of the case to the jury, are not subject to harmless error review. See, e.g., Brecht, 507 U.S. at 629; Arizona v. Fulminante, 499 U.S. 279, 309 (1991). Where a structural error occurs at trial, an appeals court does not conduct a harmless error review or look for a specific showing of prejudice. As the Supreme Court has held, "[t]he existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process." Brecht, 507 U.S. at 629-30 (citing Fulminante, 499 U.S. at 309-10).

Because the due process error here resulted in the denial of Bradley's constitutional right to retained counsel, the majority might have chosen to deem it structural error, for the state and federal courts that have considered the question have held that the erroneous denial of the right to retained counsel requires automatic reversal.

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Indeed, the facts of this case make obvious that the Brecht test requiring "a substantial and injurious effect or influence in determining the jury's verdict" was easily met here. Mr. Andrian, court-appointed counsel, established that he could not communicate with his client. He told the trial court: "As I sit here today, I guess I have to state on the record that I am in fact declaring a conflict of interest, because I cannot under the circumstances continue under the present state to work with my client. She won't talk to me, so I can't work with her; I can't prepare for trial." (RT of October 21, 1998, at 149) Adrian never withdrew that assertion.

Such a lack of communication makes it impossible for an attorney to prepare his client to testify. Petitioner did not testify in a case where she was the only witness who could offer testimony in support of her defense of a lack of the required mental state of an intent to hijack the victim's car. The deprivation of petitioner's right to counsel of choice had a substantial and injurious impact on petitioner's defense and thus cannot be deemed harmless.

CONCLUSION

For the reasons stated, respondent-appellee's petition for rehearing and suggestion for rehearing en banc should be denied.

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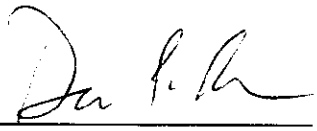

By _____
Dennis P. Riordan

Attorneys for Petitioner-Appellant
NICOLE BRADLEY

No. 04-15919

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLE BRADLEY,

Petitioner-Appellant,

v.

GLORIA HENRY, Warden,

Respondent- Appellee.

Appeal from The United States District Court
For the Northern District of California
District Court No. CV-03-03034 PJH

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

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In its petition for rehearing en banc, the State of California references the "very extraordinary nature of the facts of this case." (Petition for Rehearing [hereafter "PFR," at 14). Indeed the facts of this case concerning the deprivation of Bradley's right to counsel are remarkable, indeed perhaps unprecedented in American jurisprudence. Many of these striking facts are, however, absent from the state's petition, omissions which grossly distort the record supporting the panel's grant of habeas relief.

In March of 1998, the state trial court convened in chambers a meeting ostensibly to hear a motion by Cynthia Dunlevy, petitioner Bradley's retained counsel, to withdraw. Remarkably, despite the fact that it was petitioner Bradley's representation at her special-circumstances murder trial that was to be discussed, the trial judge excluded Bradley from the meeting, as well as Patrick Hutchinson, the counsel Bradley had specially retained to oppose the withdrawal motion. Even more remarkably, the court permitted the elected District Attorney and his deputy to participate in the hearing from which the petitioner and Hutchinson, her legal representative, had been excluded. Bradley v. Henry, 413 F.3d 961, 963 (9th Cir. 2005).

It immediately became apparent that the District Attorney's concern at the meeting was much broader than the withdrawal motion; rather, he sought to

extinguish Bradley's Sixth Amendment right to be represented by retained counsel and to ensure that the counsel to be appointed to represent her would be one *that the prosecutor approved of.* (ER 57) That attorney, Chris Andrian, who had no legal status whatsoever in the matter at the time, also was permitted to be present at the in camera hearing and to argue for the deprivation of Bradley's right to retained counsel and his own appointment. (ER 61, 70-72) The same was true of Dunlevy, Bradley's retained counsel, who, since she was seeking to withdraw against her client's wishes, certainly had no valid interest that entitled her to voice her opinion as to Bradley's future representation. In sum, a host of voices were raised at the in camera conference urging the deprivation of Bradley's constitutional right to retained counsel, but no one, including Bradley herself, was permitted to attend to speak in that right's defense.

There is simply no element of the constitutional right to procedural due process more fundamental than the guarantee of an opportunity to respond to allegations tendered as the justification for a deprivation of a party's rights. That bedrock principle flows from the eternal verity that it is impossible for a fact finder to get to the truth unless he or she hears both sides of the story. Rather than holding a fair hearing, the trial judge accepted untested statements the truth of which the state court, at a minimum, could not possibly determine. Scandalously,

some of those statements from withdrawing counsel purported to be descriptions of attorney-client communications which, even had those descriptions been accurate, could not ethically be disclosed to the court, much less to the prosecutor. No one was present at the secret session, however, to assert Bradley's attorney-client privilege.

Of paramount importance, many of the alarmist assertions tendered by both withdrawing counsel and the District Attorney, including the claim that defense counsel had not been well paid, were utterly false and, as demonstrated below, could have been proven so by Bradley and the attorney she had retained to represent her at the proceeding. But the District Attorney successfully argued that the matters discussed at the hearing should be kept secret from Bradley; and that her legal representative waiting outside chambers "*shouldn't be allowed to open his mouth.*" (ER 77), a position supported by the attorney whose appointment as Bradley's counsel the prosecutor heartily endorsed. (Id.)

As a result of the closed meeting, the contents of which were not disclosed to petitioner's counsel until the state appeal, Bradley's right to retained counsel was withdrawn by the trial court for good. Unsurprisingly, Bradley was unable to develop a relationship of trust with attorney Andrian, who had assisted in the deprivation of her right to counsel and who had been appointed "with the approval

of her adversary." 413 F.3d at 969. Andrian later declared a conflict of interest and stated that he could not work with Bradley or prepare for trial. (ER 165) He stated:

> the relationship between myself and Ms. Bradley has completely broken down, including that fact that we believe, as we sit here today, there are legal and professional conflicts of interest that exist between myself, my law firm and Ms. Bradley.

(ER 169)

Nonetheless, when John Jordan, retained by Bradley, appeared five weeks before trial and assured the state trial court he was prepared to try the case on the scheduled date and had completed all necessary financial arrangements, the court denied Bradley's substitution request, resting its decision in part on the false information provided at the in camera hearing. (413 F.3d at 968: "At the in-camera hearing, the trial judge effectively sealed Bradley's ability to maintain and secure counsel of her choice in a capital case.") (Ferguson, J., concurring).

In its petition for rehearing, the state does not dispute the proposition that the exclusion from the in-camera hearing of Bradley and Hutchinson, the attorney prepared in defense of her right to retained counsel, was legal error. Rather, like the state appellate court (and the dissenting opinion in this Court), respondent-appellee maintains that the erroneous exclusion was necessarily harmless because there was nothing of value Bradley or her legal representative could have offered

in defense of her Sixth Amendment right. That assertion, however, necessarily rests on the assumption that all of what was said at the closed hearing by Bradley's adversaries was in every respect true beyond challenge. Deeming an allegation true without permitting the object of that allegation an opportunity to refute it is precisely the dangerous practice the constitutional guarantee of due process was designed to proscribe. Having learned for the first time on direct appeal what was discussed at the in-camera hearing, Bradley tendered to the California Court of Appeal, to the state Supreme Court, and to the district court below the extensive relevant information she would have presented to the state trial court had she and attorney Hutchinson been permitted to attend the in camera hearing. That information is summarized below.

The state also appears to maintain that even if the due process violation wrongly resulted in the deprivation of Bradley's right to retained counsel, the error cannot be deemed prejudicial as long as she was represented by competent appointed counsel at trial. That reasoning, of course, would render the Sixth Amendment right to retained counsel meaningless; a trial court could capriciously refuse to allow a defendant to retain counsel knowing that the constitutional violation would go without remedy as long as the defendant was represented by a public defender or state-appointed counsel. The law, as appears, is precisely to the

contrary: a violation of the constitutional right to retained counsel is inherently prejudicial. In any case, as the majority held, the conflict between attorney Andrian and Bradley that Andrian himself declared and the complete breakdown in their relationship rendered the prejudice from the denial of petitioner's right to retained counsel "palpable." 413 F.3d at 968.

There is no reported decision in which a defendant was so patently deprived of both her constitutionally guaranteed opportunity to defend her Sixth Amendment right to retained counsel, as well as of the substance of that constitutional right, as was petitioner at her state court trial. The majority's decision will help to ensure that the wrong which occurred here is not repeated. Rehearing and rehearing en banc in this very fact-specific case should be denied.

I. THE EXCLUSION OF BRADLEY AND ATTORNEY HUTCHINSON FROM THE IN CAMERA HEARING WAS DEMONSTRABLY PREJUDICIAL AS IT DEPRIVED PETITIONER OF THE OPPORTUNITY TO PRESENT INFORMATION CRITICALLY RELEVANT TO ISSUES BEFORE THE TRIAL COURT

A. The Relevant Information

The subject of the March 4th hearing was attorney Dunlevy's (and Steigerwalt's) withdrawal motion. The motion was based on an alleged conflict arising from two primary sources: (a) allegations of surveillance of public officials by petitioner's father, with the possible object of violence, and (b) the claim by

Dunlevy that the senior Bradley had failed to pay legal bills, thus causing the lawyers a financial hardship and undermining the defense by causing experts to abandon the case. (ER 24-25) As to both of these issues, Bradley's presence at the hearing was critical.

The California Court of Appeal stated that had Bradley attended the hearing, she could not have addressed the first of the critical subjects at the hearing, i.e, of alleged surveillance and harassment, "because it was never alleged that she had caused these things to occur." (ER 40) On several levels, that assertion is unsound. The trial court heard Ms. Dunlevy out on the subject, although *she* had admitted that her information was hearsay-- i.e., "from conversation"-- and Dunlevy was not alleged to have "caused these things to occur." The District Attorney, who should never have been at a hearing on the subject of Bradley's counsel in the first place, was permitted to shoehorn into the record the complete fantasy "that someone was planning a violent act to get a continuance." (ER 24) That the allegations were unfounded is made evident by the fact that, while the District Attorney promised to "get a grip on an investigation on who has been stalking a deputy District Attorney and why" (ER 79), no investigation ever unearthed any evidence of wrongdoing on the part of the defense.

So, what could Bradley have done had she and a lawyer who was not

abandoning her been at the hearing? A great deal. Had she been permitted to attend the hearing on March 4th, defendant Bradley could have provided reliable information from Howard Eisemann (who entered the matter as an investigator in late 1996 with the firm Professional Investigations, Inc. of San Diego) and others, or even called them to testify, effectively rebutting Dunlevy and the District Attorney's explosive and completely manufactured allegation of violent harassment of state officials.

As Ms. Bradley informed the Court of Appeal and the California Supreme Court in her Petition for Review, the truth regarding the "confidential" file is this: at the commencement of this case in 1996, Joe Bradley, the defendant's father, had an investigative firm do background and records checks on the principals involved in the case, including police and prosecutor Knotts. The records obtained were of the sort generally available in public data bases. To the extent the case involved an allegation that a detective named Duenas coerced a confession from the defendant, a background investigation was appropriate. More importantly, Eisemann has confirmed that the file in question was in existence in late 1996, and that it never related to any personal surveillance of the prosecutor or anyone else associated with the prosecution of the case.

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Steigerwalt and Cynthia Dunlevy soon after they were formally substituted in on January 21, 1998. Eisemann discussed the file with Dunlevy soon thereafter. The clear thrust of Dunlevy's remarks to the trial court was that the file in question was something she had recently discovered, and that it was related to a then-ongoing effort to harass the prosecutor. These assertions were simply untrue. Bradley could have refuted them if she had been permitted to attend the March 4th hearing.

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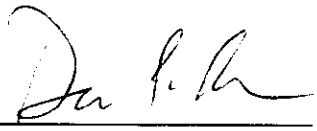

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